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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Special Appeals of Maryland

PETER C. ANDRESEN
Petitioner
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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	6
ARGUMENT	15
CONCLUSION	33

TABLE OF AUTHORITIES CITED

Cases:

Aguilar v. Texas,
378 U.S. 108 (1964) 29

Bellis v. United States,
417 U.S. 85 (1974) 16, 18

Boyd v. United States,
116 U.S. 616 (1886) 18, 19, 20, 21

Brady v. Maryland,
373 U.S. 83 (1963) 7, 33

Bumper v. North Carolina,
391 U.S. 543 (1968) 23

Chapman v. California,
386 U.S. 18 (1967) 33

Couch v. United States,
409 U.S. 322 (1973) 17, 19

Page

Curcio v. United States,
354 U.S. 118 (1957) 19

Entick v. Carrington,
19 How. St. Tr. 1029 (1765) 20

Gouled v. United States,
255 U.S. 298 (1921) 20, 21

Griswald v. Connecticut,
381 U.S. 479 (1965) 19

Hill v. Philpott,
445 F.2d 144 (C.A. 7),
cert. denied, 404 U.S. 991 (1971) . . 8, 9, 16, 18, 19, 21

Huber v. State,
2 Md. App. 245 (1967) 28

McEwan v. State,
194 Md. 494 (1950) 28

Miller v. Pate,
386 U.S. 1 (1967) 33

Miranda v. Arizona,
384 U.S. 436 (1966) 7

Polisher v. State,
11 Md. App. 555 (1971) 26

Schmerber v. California,
384 U.S. 757 (1965) 21

Stuart v. United States,
416 F.2d 459 (C.A. 5, 1969) 19

United States v. Blank,
459 F.2d 383 (C.A. 6),
cert. denied, 409 U.S. 887 (1972) . . . 8, 9, 16, 17, 18

United States v. Lefkowitz,
285 U.S. 452 (1932) 20

Page

Warden v. Hayden,
387 U.S. 294 (1967) 7, 20, 21, 27

Weeks v. United States,
232 U.S. 383 (1914) 20

Wilson v. United States,
221 U.S. 361 (1911) 19

Constitutional Provisions:

Constitution of the United States —
Amendment IV 3
Amendment V 3
Amendment XIV 4
Constitution of Maryland 10, 31

Statutes:

Annotated Code of Maryland —
Article 5 — Section 5 . . . . . 4, 22
Article 27 — Section 551 . . . . . 4, 26
Courts & Judicial Proceedings Article,
§12-201 5
§12-203 . . . . . 5, 32

United States Code —
Title 28 — Section 1257(3) 2

Rules:

Rules of the Supreme Court
Rule 19 15

Reference Works:

Cornelius, *The Law of Search and Seizure* 23

Wigmore, 8J *Evidence* 8

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To the Court of Special Appeals of Maryland

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Peter C. Andresen, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered in the above-entitled case on January 10, 1975 upon which the Court of Appeals of Maryland, the highest Court of the State, denied certiorari on March 31, 1975.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 24 Md. App. 128, 331 A.2d 78 (1975), and is printed in the Appendix hereto, *infra*, page A-1.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, which is sought to be reviewed, was dated January 10, 1975. (A-1) A timely Motion for Reargument and Modification of Opinion was denied and that Court's Mandate was issued on February 11, 1975. (A. 89, 90)

A timely Petition for Writ of Certiorari to the Court of Special Appeals of Maryland was filed in the Court of Appeals of Maryland, the highest Court of the State, and was denied on March 31, 1975. (A. 92) The time within which to petition for certiorari to this Honorable Court would therefore run from this date.

Motions for Statement of Reasons for Denial of Writ of Certiorari to the Court of Special Appeals and for Reconsideration of Petition for Writ of Certiorari to the Court of Special Appeals were denied by the Court of Appeals of Maryland on April 10, 1975. (A. 93)

The jurisdiction of this Court is invoked under *28 U.S.C., Sec. 1257(3).*

QUESTIONS PRESENTED FOR REVIEW

I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes

and memoranda, books and records, which were seized from his desk and files in his personal office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?

III. Was the petitioner denied his rights to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, because he did not receive a fair trial due to the cumulative effects of the actions of the prosecution and the State Courts?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States: Amendment IV –
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V –
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation."

Amendment XIV –

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland:

Article 5, Sec. 5, -

No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Article 27, Sec. 551, -

Whenever it be made to appear to any judge . . . by a written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by any individual

or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge . . . or that any property subject to the seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such judge . . . may forthwith issue a search warrant directed to any duly constituted policeman . . . authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued.

Courts & Judicial Proceedings Article –

§ 12-201. Certiorari to the Court of Special Appeals.

Except as provided in § 12-202 of this title, in any case or proceeding pending in or decided by the Court of Special Appeals upon appeal from a circuit court, any party, including the state, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than 30 days after its mandate has been issued. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

§ 12-203. Action by Court of Appeals.

If the Court of Appeals finds that review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that

the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

STATEMENT OF THE CASE

The "inner sanctum" of Petitioner's law offices and files was invaded in October, 1972, by police officers and members of the State's Attorney's staff armed with an alleged warrant to search the premises. The searchers, approximately eight in number, spent the greater part of six hours rummaging through Petitioner's desk and private files. All of the private papers, documents and handwritten notes present and belonging to the Petitioner were scanned, many were examined with detail. Upon completion of the search, the officers carried literally thousands of such testimonial and communicative papers away with them.

On the next day Petitioner was charged by a Bill of Information with four counts of false pretenses, containing virtually the same substance as contained in the application for the search warrant. About two weeks later, after thorough examination of the seized papers by the searchers, Petitioner was indicted on approximately fifty (50) additional counts. The subject matter of all of the estimated fifty-four (54) counts was significantly disclosed by the private papers taken.

The State elected to try Petitioner on the original four counts consolidated with seventeen other counts, forming one of the indictments, for a total of twenty-one (21)

counts. Petitioner filed a motion to suppress the papers seized, among others. At the pre-trial hearing thereon, the State elected to present only a small fraction of the papers seized as pertaining to the charges upon which Petitioner was to be tried. These papers still numbered in the hundreds. A great portion of the papers presented at the hearing was suppressed by the trial judge; but a significantly large number were not. This conclusion was reached by the trial court by its application of *Warden* v. *Hayden*, 387 U.S. 294 (1967) to petitioner's case by stating in its Memorandum Opinion and Order that:

> "The Hayden case, however, overruled this distinction and held that the Fourth Amendment of the United States Constitution was not violated by the seizure of 'mere evidence' if there was proven to be a nexus between the items seized and the criminal behavior. This case held that 'mere evidence' may be seized if probable cause can be established that the evidence will aid in the particular apprehension or conviction. . . As to the excepted items, it appears to the Court that the State has conclusively shown a nexus between them and the alleged criminal behavior."

The trial court also rejected all of petitioner's attacks upon the warrant, its reasonableness and the extent of the search, whether authorized by the warrant or not. In specifically rejecting petitioner's Fifth Amendment claim that the private papers seized could not be used against him, since they were privileged, the trial court held:

"The thrust of defendant's argument here is that he has the right of privacy in and over his person, house, papers and effects, on the ground that to permit these items to be introduced into evidence would be a prohibition against compulsory self-incrimination.

"On this point there seems to be no Maryland law, and in two cases before the Federal system, the Courts took opposite views and in both cases certiorari was denied by the United States Supreme Court.

"In *United States* v. *Blank*, 459 Fed. 2d 383 [Sixth Circuit, 1972], the United States Court made a distinction between those records sought by subpoena and records sought by search warrant. They held that there was a valid and important distinction. The subpoena compels the person receiving it by his own response to identify the document and deliver as the one described in the subpoena; the search warrant involves no such element of compulsion upon an actual or potential defendant. In the *Hill* v. *Philpott* case, 445 Fed. 2d 145, Second Circuit (sic), the Court held that the subpoena-search warrant distinction was 'more shadow than substance,' and held that the seizure of personal papers of the defendant was in violation of the Fifth Amendment. The Blank case in effect rejected the holdings in the Philpott case, and seems to this Court to be the better law. 8J, Wigmore, *Evidence*, Sec. 2264 [McNaughton, Rev., 1961]. It is conceded in this case that evidence

produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing. Relying on the Blank case and Wigmore on *Evidence*, this Court holds that the seizure of the excepted items by search warrant does not violate the Fifth Amendment to the United States Constitution."

Those papers remaining unsuppressed were introduced into evidence, over objection, at Petitioner's trial and were significantly important in leading to his conviction, as is evidenced by the Opinion of the Court of Special Appeals of Maryland. (A. 20, 24, 25)

The Court of Special Appeals, in upholding the decisions of the trial judge as to petitioner's Fourth and Fifth Amendment challenges, also identically rejected the holding of *Hill* v. *Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), and adopted the holding of *Blank* v. *United States*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, just as the trial judge had done. (A. 28-54)

Petitioner's trial had been removed from Montgomery to Frederick County, Maryland (an adjoining county) for trial, due to prejudicial pre-trial publicity based chiefly on a press-release authored by the prosecution. (A. 1)

During the course of petitioner's trial he was, among other things discussed *infra* in the Argument section of this petition: Denied a Motion for Severance when, without offering one iota of proof, the State later abandoned those charges which had been requested to be severed,

which amounted to thirteen of the twenty-one counts (A. 69); denied a Motion for Continuance to allow defense counsel, who was engaged in another trial, to adequately prepare an affirmative defense and, also to await appellate decisions on two related cases (A. 68); denied a Reservation of Question for Court En Banc as to the Fifth Amendment objection raised in the Motion to Suppress, when such a Reservation is guaranteed by the *Constitution of Maryland* (A. 73); denied access to the prosecution's case because of evasive, uncooperative tactics by the prosecution and the outright suppression of the existence of an immunity agreement with the prosecution's chief witness, even though discovery orders had granted such access (A. 63-66); denied a Motion for a New Trial after the appellate rulings in the related cases referred to above were rendered, which directly contradicted material facts testified to by a witness at the original trial, along with other evidence, argument and jury instructions, so that a different result would probably have been required (A. 66-67, 78-81) and; was sentenced under criticism that he had continued to maintain his innocence (A. 81-84). These holdings were upheld by the Court of Special Appeals.

Petitioner contends that the cumulative effect of the above actions, when taken together with the closing argument of the prosecution, was so prejudicial that he was denied his rights to a fair trial and due process of law. Counsel for petitioner strenuously objected to the closing remarks of the prosecutor. There was, however, no curative instruction given to the jury. This argument and lack of curative instruction was upheld by the Court of Special Appeals as harmless or "inconsequential." (A. 54-57)

In leading into his concluding remarks, the prosecutor embarked with the following statement:

> "The evidence is before you now, because as a matter of law, the Court has ruled that there is sufficient evidence by which you can find the defendant guilty of the counts with which he remains charged at this point."

Defense counsel objected to this statement as being highly prejudicial, yet the trial judge did nothing but caution the prosecutor out of the hearing of the jury. No curative action whatsoever was taken by the trial court.

Subsequently, among his concluding remarks about petitioner, the prosecutor was allowed to exclaim, over subsequent objection:

> "He did it, he did it, he knew he did it, and he did it with fraudulent intent; he did it and he stuck the homeowners with it."

> "These are the truths – not the half-truths that have been coming out on cross-examination; not the partial truths that have been coming out on cross-examination; this is the totality of the thing, this is how it fits together . . . and this evidence points to one conclusion and one conclusion only – the conclusion it points to is that he did it, and he knows he did it, and everybody in this courtroom knows he did it; and he's guilty."

> "He knows it wasn't paid; there's no doubt about it, he knows it wasn't paid . . . he's guilty, he's guilty . . ."

"When you're dealing with settlement attorneys and they're stealing home buyer's money, there's more than one way to skin an alley cat. I have never seen a case as bad as this one. This has got to be stopped, and you are the only ones who can do it. We look to you to do something to stop it . . . I don't care what he says about mistake – the facts don't say it, the facts say one thing and one thing only – he did it. He did it, he did it, he did it. He's a bad man, and he did it. And that's all the facts seem to conclude – he did it."

" . . . and we are relying on you; the people are relying on you; the people down 70S are relying on you. You can go the easy way and just kind of say, 'Well, I'll give up and let the man go,' and maybe they'll give him a parade down Patrick Street and send him back down 70S to Montgomery County, and he'll thank you forever, and maybe he'll even open an office up here in Frederick because you were so kind to him."

"And I'm asking you just one final thing – don't flinch from your job, but if you do get hung up, if you do hang up and can't decide, it will become necessary for the State to retry the entire case . . . don't let us know that you are hung up in there; come to that firm decision that he is guilty. We need you to give us justice, we need you to tell us what we all know in this courtroom – that he's guilty. . ."

The above were among the final statements to the jury by the prosecutor in the case sought to be reviewed.

Earlier in his closing dissertation the prosecutor had leveled a few remarks at defense counsel and a State's witness who had testified adversely to the State's case regarding the heart and soul of Petitioner's case – that he had properly disbursed the funds. Among them were:

"But remember what really happened – Marsalek (the State's witness), number one, either doesn't know or isn't telling the whole story. . ."

"Either Andresen lied to him or they worked together in lying."

"Mr. Lamb (defense counsel) has been doing a good job defending Mr. Andresen; he's making all those objections like he's supposed to be doing; yelling and screaming . . . going to divert your attention . . ."

"There are a couple of things they [defense counsel] have said that are not proper and are not accurate, and they must be cleared up, because justice must be done in this case, and you're not going to be able to do justice unless you are put on the straight path, and that straight path has been made awfully crooked over the last hour and a half."

". . . this business about Marsalek's (the State's witness) opinion – Marsalek – Marsalek's opinion is just nothing but what Andresen told him; its just nothing other than what Andresen told him. It's the same flim-flam, and just read it back at you just like it came from Andresen. It's just like Andresen was on the stand, telling you through Marsalek's mouth – it's the same thing."

"It has been deliberately misrepresented to you that these assignments were mechanic's liens. [By defense counsel, when in fact they correctly were.] . . . it didn't happen, it isn't true. It isn't true . . . There's no mechanic's liens here — these are assignments."

"That's not a lien on the title, that's no mechanic's lien, that's an assignment . . . and in no way is it a mechanic's lien, and I cannot stress that to you in any more direct way. It's a . . . you have been misrepresented, you have been deliberately misled. [By defense counsel.] There is nothing whatsoever to do with a mechanic's lien in this case, not a thing – nothing."

"The facts have been distorted; have been distorted terribly, have been distorted desperately." (By defense counsel.)

"Mr. Andresen has been flim-flaming the witnesses on the stand – he flim-flammed Covert, he flim-flammed Norman Hecht, he flim-flammed F.O. Day, he flim-flammed Marsalek, now he's trying to flim-flam you. All this lying, cheating, lining his pockets while thumbing his nose at everybody – that's the truth of what happened, that's what it all boils down to. All this flim-flamming has been an attempt to cover up the facts, the truth and not let it come out . . . and you've got to open your eyes wide to get by all this desperate, desperate diversion." (By defense counsel and appellant, who did not testify.)

It was in this posture that petitioner's case went to the jury. They had previously been instructed by the Court

and no curative instruction was given following the prosecutor's statements.

Petitioner was convicted by the jury of all of the eight counts not abandoned by the prosecution. The Court of Special Appeals then reversed four of the counts. This leaves the Petitioner presently convicted of the four counts upon which review by this Honorable Court is sought.

ARGUMENT

I

AN ATTORNEY AT LAW, WHO IS A SOLE PRACTITIONER, MAY INVOKE HIS PRIVILEGE AGAINST SELF INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES, TO PREVENT THE INTRODUCTION OF HIS PERSONAL HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS, WHICH WERE SEIZED FROM HIS DESK AND FILES IN HIS PERSONAL OFFICE, UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, INTO EVIDENCE AGAINST HIM AT HIS CRIMINAL TRIAL.

On this important point, petitioner's cause is ripe for review by this Honorable Court. It meets most of the criteria established by the Considerations Governing Review on Certiorari of *Rule 19* of this Court, *i.e.*:

(a) The state court has decided an important federal constitutional question which has not heretofore been determined by this Court; and has decided it in a way probably not in accord with applicable decisions of this Court on the same subject, but not precisely on the same point; and, in so doing has adopted the holding of a federal court of appeals wherein:

(b) A court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has decided an important federal constitutional question which has not been, but should be, settled by this Court; and has decided it in a way in conflict with applicable decisions of this Court on the same subject, but not precisely on the same point.

The above premise is true because the state courts have adopted, as being correct, the reasoning of *United States v. Blank, supra,* as stated in the Statement of the Case herein, in holding that the Fifth Amendment privilege does not attach to personal records simply because they were seized under a valid search warrant, because:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant."

In so doing, the state courts have openly and directly rejected the holding of *Hill v. Philpott, supra,* (another United States Court of Appeals case recently cited with unanimous approval of this Court in *Bellis v. United States,* 417 U.S. 85, 87-8 (1974)). *United States v. Blank* and *Hill v. Philpott* are in direct conflict as to the reasoning used in the premise decided in petitioner's cause, and upon which review is requested here. *Hill v. Philpott* held that personal business records seized by an Internal Revenue agent could not be used without violation of the defendant's Fifth Amendment rights.

It is important to note that the State of Maryland does not contend, nor did the state courts take issue with the fact that the papers seized and admitted into evidence over objection in petitioner's case were personal papers of the type which would ordinarily be privileged and could not be used against him. Both the respondent and the state courts readily admit that, if the subject documents had been sought by subpoena, rather than seized, they would have been privileged. (A. 51; Memorandum and Opinion of trial court as quoted in Statement of the Case herein, pp. 8-9.) They, however, each conclude that, because the search and seizure of the papers was held to be reasonable, the Fifth Amendment protections therefore do not apply because petitioner "was not compelled to do anything". (A. 51-4)

Petitioner, initially must state that he does not agree with the reasoning of *Blank* that there is no element of compulsion present when a defendant's personal papers are seized. In petitioner's view, as well as the view of this Court he believes, there is a greater degree of compulsion exhibited by a forced taking of one's personal papers during a search and seizure than by directing production of those documents by use of a subpoena.

Such a holding is a complete divorce from the true meaning of compulsion or being compelled. Recently, in his concurring opinion in *Couch v. United States,* 409 U.S. 322 (1973), Mr. Justice Brennan observed:

> If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to

> take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view to incriminate himself within the meaning of the Fifth Amendment.

Furthermore, the reasoning of *Blank*, relied on so strongly by the State courts, was somewhat "watered down" by its additional holdings in that instance that the papers seized "were not communicative in nature", were not "personal and private writings", and were "on their face instrumentalities" of a crime. This is the probable reason why certiorari was denied in that case by this Honorable Court. Such is concededly not true of petitioner's case!

Finally, it is submitted that the applicable previous decisions of this Court indicate that the holding of the *Blank* court and the state courts in this cause must be rejected and that of the *Hill v. Philpott* court upheld.

As recently as in *Bellis v. United States, supra*, Mr. Justice Marshall proclaimed for this Court that:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him

> of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635; *Wilson v. United States*, 221 U.S. 361, 377 (1911). The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969). As the Court explained in *United States v. White, supra*, at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio v. United States*, 354 U.S. 118, 125 (1957); *Couch v. United States, supra*, at 330-331. . . . We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought" -- an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication — and "proscribes state intrusion to extract self-condemnation," *Couch v. United States, supra*, at 327. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The above dissertation reflects the teaching of the great English case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), which were cherished by our statesmen when the Constitution was adopted. These teachings were first enunciated in *Boyd, supra*, then in *Gouled v. United States*, 255 U.S. 298 (1921), and again in *United States v. Lefkowitz*, 285 U.S. 452 (1932) wherein it was said that in *Entick v. Carrington:*

> Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help federal conviction even in cases of most atrocious crime . . .

In *Weeks v. United States*, 232 U.S. 383 (1914), it had been said:

> . . . as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, . . . is entitled to protection."

In *Warden v. Hayden*, 387 U.S. 294 (1967), the landmark case for seizure of "mere evidence" as opposed to fruits of crime, etc., which the state courts in petitioner's case reason as overruling *Gouled* as to the above cited protection as to private papers, dealt with articles of clothing, and in fact expressly eliminated personal papers from its holding, when the Court said at page 302-3:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature

> and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The principles of *Boyd* were therefore not overruled by *Warden v. Hayden*, but in fact upheld!

Thus, when the *Hill v. Philpott* Court stated:

> The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "instrumentalities, fruits of crime, or contraband." In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion . . .
>
> Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in that case from the books and papers involved in both *Boyd* and *Gouled.*

— they were professing the status of the law of the land in this regard, which remains so.

Additionally, Article 5, Section 5, *Annotated Code of Maryland*, also precluded the admission of the evidence seized under the search warrant in petitioner's trial for false pretenses, a misdeameanor.

Art. 5, Sec. 5, since repealed, was in full force and effect at the time of the search and seizure and at the time of Petitioner's trial. Subsection (a) thereof provides:

> No evidence in the trial of misdeameanors shall . . . be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Since the effect of the admission of the seized evidence was to compel Petitioner "to give evidence against himself" and since the statute prohibited the admission of same in no uncertain terms, his convictions should have been reversed by the Court of Special Appeals.

This premise was pointed out to the Court in Petitioner's appeal brief, argued before the Court and brought up again on motion for reargument, all to no avail since the Court of Special Appeals refused comment on it. In ignoring the cited statute the Court of Special Appeals has denied Petitioner his constitutional rights which also merits revicw by this Honorable Court.

II

THE SEARCH OF PETITIONER'S OFFICES WAS VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

A. The search warrants were never formally introduced into evidence.

In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court made the observation that if the State relied upon a search warrant to justify a search, but failed to produce it in evidence, "there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause" (footnote 15 at page 550). In Cornelius, *The Law of Search and Seizure*, 185, "Duty of prosecution to introduce search warrant, in evidence," (1926), it is stated:

> "A conviction cannot be sustained where a search warrant, under which the evidence has been obtained, is not introduced in evidence, where it appears from the evidence that the discovery and seizure * * * was attempted to be justified by the officer's possession of a search warrant the validity of which, though objected to and attacked, was not established by the introduction of the warrant itself, or by proof of its contents."

Admittedly, the warrants and applications were present at the suppression hearing, discussed and passed around; but the State failed to have them introduced or admitted into evidence. The Court of Special Appeals felt that because the warrants were forwarded by Court order to the Circuit Court for Frederick County "for the purpose of their introduction into the records" and the fact that they were physically present at the hearing and that the trial judge "admonished the State not to have witnesses read from the warrant because 'the warrant speaks for itself' ", their non-introduction and lack of admission into evidence was overcome. (A. 28-33)

The introduction and admission into evidence of warrants is a formality that cannot be dispensed with. To hold otherwise would dispense with the necessity to introduce *any* document into evidence where its existence and contents are intended to be proved or that in the alternative a proper foundation be established for the use of secondary evidence. Neither were done here.

B. Because of the descriptive terminology of the things to be seized used in the warrants, they became prohibited "general" warrants not "particularly describing the . . . things to be seized".

The terminology of the warrants in terms of describing the things to be seized is set out in full at page A. 38 of the Opinion of the Court of Special Appeals in the case sought to be reviewed. The Court felt that the warrants were "models of particularity". This is true, *up to a point.* When the language of the warrants left that point of demarcation of particularity, they became general warrants.

Initially, and throughout the lengthy descriptive phrase of the particular things to be seized, the warrant lists, in minute detail, every conceivable piece of writing and tangible evidence possible "showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses" "pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T . . ." The list of papers and records sought could not possibly be more complete!

But then the prosecutor struck the fatal blow! He showed the true intent of the warrant and its description of things to be seized when he added the following phrase, which negated all of the previously set out particularity:

"together with other fruits, instrumentalities and evidence of crime at this time unknown."

The addition of this phrase had the same effect as amending a bill in the Legislature which prohibits sex discrimination by adding a phrase that it "does not apply to women". The phrase completely reverses and negates the meaning of the language and thereby authorized a prohibited "general rummage through all the materials".

This was not a "minor imprecision in draftsmanship", but a carefully conceived plan to search and seize hordes of material not pertaining in any way to Lot 13, Block T, which plan was in fact carried to fruition and upheld by the Court of Special Appeals.

The Court's Opinion holds that: "We read the questioned phrase as referring to 'other fruits, instrumentalities and evidence' of the crime of false pretenses with respect to Lot 13T." (A. 38) This holding is simply not reasonable. The addition of the phrase extended the warrant to include *any* evidence of *any* crime (not particular evidence of a particular crime) and therefore made the warrants "general". If the phrase referred to Lot 13T, why didn't it say so? Why was it added when the particularity as to 13T was so complete? Why did it allow seizure of evidence "of *crime at this time unknown*"? It is the answers to these questions that should be resolved by review.

C. Because of the nature of the crime of false pretenses, it was impossible for the judge who issued the warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises.

The search warrants were issued on October 30, 1972, based on contemporaneous affidavits. The very nature of the crime of false pretenses, which was allegedly established in the affidavits as having been committed in July, 1972, is that there was "a false representation of a past or existing fact". *Polisher v. State,* 11 Md. App. 555 (1971). Therefore the issuing judge could hardly have found that a crime was currently "being committed" over three months later, which he did. The Court of Special Appeals, relying on Art. 27, Sec. 551, *Annotated Code of Maryland,* wherein it is stated that a search warrant may be issued upon a finding that probable cause exists that "any property subject to seizure under the criminal laws of this state is situated" on the premises, made the warrant acceptable. The Court then goes on to read the *Fourth Amendment* as part of the "Criminal laws of this State". (A. 37) Even if so, this finding completely ignores the fact that the affidavit in support of the warrant alleged, and the issuing judge found by incorporating the affidavit into the warrant, "that there is probable cause to believe that the laws relating to false pretenses . . . are being violated upon the . . . premises." This was an impossibility.

D. The Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by search and seizure violated the principals and purposes annunicated by this Court in *Warden v. Hayden,* 387 U.S. 294 (1967).

The Court of Special Appeals, in the case sought to be reviewed, first, as above stated, held that the subject warrants particularly described the things to be seized as "referring to 'other . . . evidence' of the crime of false pretenses with respect to Lot 13T". (A. 34-5) Then the Court goes on to hold:

> Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake and lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of their *mens rea,* we hold that they too were seizable evidence under the warrants. (A. 47).

What this holding does is to ignore the standard set forth in *Warden v. Hayden, supra,* that:

> Thus in the case of 'mere evidence', probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *In so doing, consideration of police purposes will be required.* (Emphasis supplied)

In the instant case, the papers "not relating to Lot 13T" which were seized, were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses. Instead the prosecutor, after examining the documents for over two weeks, obtained the misappropriation indictments based upon them.

In so doing, and consolidating the false pretense counts with the misappropriation counts for trial, he made the documents relevant in violation of the principles stated in *Huber v. State,* 2 Md. App. 245 (1967). Had it not been for the additional indictments and the consolidation, the additional papers could never have been admitted because they were irrelevant to the false pretense charges. This is clear, because the lower court, despite repeated attempts by the prosecutor throughout the entire trial to introduce other seized evidence of other acts by the petitioner in his attempt to establish *mens rea,* refused its admission. The court properly refused because as the court ruled, the evidence as to the prior acts was clearly inadmissable under the principles of *McEwan v. State,* 194 Md. 494 (1950), due to the fact that the State *never* established a *prima facie* case of guilt in the estimation of the trial judge.

Therefore, an examination of the prosecutor's motives, as dictated by this Court in *Warden v. Hayden* reveals that the evidence seized as to the misappropriation counts would also have been inadmissable had it not been for the additional indictments. It should also be noted that these papers were among thousands of others seized. This Court's consideration of the prosecutor's motives by review should result in a determination of lack of probable cause for the seizure of the papers.

E. The two-prong test of credibility – reliability and trustworthiness of the non-swearing informants was not satisfied.

There were no allegations of direct observation or personal knowledge as to the things sought in the alleged affidavits in support of the search warrants as to whether or not they were present on the premises. Therefore the issuing Judge was forced to rely entirely on information received second, third or fourth hand as hearsay in his determination of probable cause in the warrants. Therefore it was necessary to present reasons why the information received was reliable in order for the magistrate to determine the truthfulness of the information. This is necessary in order to satisfy the two-prong test of credibility-reliability and trustworthiness as enunciated in *Aguilar v. Texas,* 378 U.S. 108 (1964).

The information received in the instant case was not received from "disinterested witnesses", "disinterested civilian sources" or "victims of crime" as opined by the Court of Special Appeals. (A. 43-4) If Young was to be considered as such, it must be noted that the information supplied by him supported no factual basis for the commission of a crime. His information, if in fact he felt something was wrong, was at least fifth or sixth hand. The only possible information that could have led to a belief that a crime had been committed originated with Hecht and, by a stretch of the imagination, from State National Bank. Hecht (and for that matter Covert of State National) were not disinterested witnesses or victims, they were actually deeply embroiled in a civil controversy with appellant regarding the same factual situation, of which the affiants had actual knowledge as was shown at the hearing on the

Motion to Suppress and at the time of petitioner's trial, and which was not disclosed to the issuing Judge as was necessary.

III

THE PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE HE DID NOT RECEIVE A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF THE ACTIONS OF THE PROSECUTION AND THE STATE COURTS.

Review is sought here to correct a denial of due process because the closing remarks of the prosecutor, some of which were pointed out in the Statement of the Case herein and went uncorrected over objection, were so innocuous, opinionated and prejudicial, that, when considered together with the other prejudice to the accused, evident at the state trial and appellate levels, amounted to the denial of a fair trial.

The closing argument was the crowning blow to a long series of prejudicial errors and denials which were compounded on appeal, so that when the totality of the effect is considered in light of the closing argument, petitioner was denied due process of law.

A recitation of some of the problems encountered by petitioner, to which he objected at every stage of his trial and appeal, and was denied relief or overruled follow:

1. The prejudicial pre-trial publicity requiring removal of his trial from his home county and peers. (A. 1)

2. The initial "overcharge" of the indictments, denial of a request for severance, and abandonment of most of the charges without proof. (A. 69)

3. Denial of his Motion for Continuance to await appellate decisions on related cases (which had been advanced for hearing), to allow his counsel to prepare an affirmative defense, and to allow an accountant to complete an audit of his escrow accounts so he could testify. (A. 68)

4. Denial of a Reservation of Question for Court En Banc as to the Fifth Amendment objection raised, a guaranteed right under the *Maryland Constitution.* (A. 73-5)

5. The "general" and "over-search" and "over-seizure" as previously discussed.

6. Prejudicial instructions and lack of instruction after request, including a reference to the petitioner's refusal to testify. (A. 57-63)

7. The side deal with Petitioner's client, Clark, which was not disclosed until the time of trial. A written immunity agreement had been in existence ever since appellant was charged, yet it was not revealed even after request in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). Petitioner conferred with Clark frequently without being given the necessary warnings (*Miranda v. Arizona,* 384 U.S. 436 [1966]). The agreement was finally sprung on Petitioner at trial. (A. 63-6)

8. The evasive and uncooperative tactics of the prosecution in response to discovery orders. This included a tardy response to a granted bill of particulars ten minutes before trial comprised of evasive and incomplete

answers and a list of 54 prospective witnesses with lack of proper addresses. (A. 86-7)

9. Denial of his Motion for New Trial after a favorable ruling on a related case had seriously contradicted the state's evidence, witnesses and argument and the court's jury instructions. (A. 66-7, 78-81)

10. His being sentenced under criticism for maintaining his innocence when he did not testify at the trial. (A. 92-4)

11. The trial court applied an incorrect standard in denying his Motion for Acquittal, looking at the evidence in the light most favorable to the State rather than a "reasonable doubt" standard. (A. 88-9)

12. The Court's refusal to suppress the wrongfully seized evidence and its refusal to reconsider as previously discussed.

13. Numerous adverse rulings on evidence. (A. 69-73)

14. The refusal by the Court of Special Appeals to reply to many of petitioner's major contentions, especially as to lack of jurisdiction, and its misapplication of past decisions of the case, even after a Motion for Reargument had been filed pointing these important omissions and errors out. (A. 89)

15. The refusal of the Court of Appeals to state its reasons for denial of certiorari after a request for same when Sec. 12-203, Courts and Judicial Proceedings Vol., *Annotated Code of Maryland*, requires it. (A. 93)

In light of the extent of the prosecutor's efforts to mislead the jury and misrepresent the evidence and the

apparent comment on the failure of the accused to testify, it is contended that the error reached such proportion that the federal standard would apply so that there would be a violation of due process under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Miller v. Pate*, 386 U.S. 1 (1967). In such a case, it would be the burden of the prosecutor to show the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967), which it never attempted to do.

CONCLUSION

For the foregoing reasons, especially as to the Fifth Amendment contentions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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